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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1516

FELIX J. PRESLEY,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as *Felix J. Presley* v. *State*, 308 So.2d 85 (Miss. 1975). Rehearing was denied on March 3, 1975. A copy of the opinion is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. Section 1257(3). Petitioner has posed one question for review. Jurisdiction is improperly invoked under said authority as hereinafter set forth in Respondent's argument.

QUESTION PRESENTED

Petitioner's question, as here stated, was never presented to the Mississippi Supreme Court. Correctly redrafted, the question should be was Petitioner's claim, that his right to effective assistance of counsel was denied by his retained counsel's failure to timely file a notice to the court reporter to transcribe the notes for appeal, ever presented to the Mississippi Supreme Court?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments VI and XIV, Section 1; however, as hereinafter set forth, said provisions are not properly before this Court.

STATEMENT OF THE CASE

On March 6, 1974, in the Circuit Court of Madison County, Mississippi, Petitioner was indicted for assault and battery. After trial by jury, Petitioner was convicted and sentenced to pay a fine of $500.00 and to serve six (6) months in the Madison County Jail with four (4) months of the jail sentence suspended pending five (5) years good behavior.

On appeal to the State Court, Petitioner's brief argued against three (3) jury instructions. Petitioner's retained counsel had failed to give timely notice to the court reporter that a copy of the notes was desired for appeal, which resulted in the transcription of the notes being stricken from the record on motion by the State. Although

the notes were stricken, the three (3) jury instructions complained of still remained to be examined on appeal.

Section 9-13-33, Mississippi Code of 1972 requires that notice be given to the court reporter within ten (10) days after adjournment of the Circuit Court from which a copy of the notes is desired for appeal. A copy of the applicable part of this statute is before this Court as an Appendix B to the Petition for Writ of Certiorari. At the time of its order to strike the notes, the Mississippi Supreme Court had held in all cases examined by the State that notice to the court reporter was jurisdictional, and unless the statutory mandate was met, the notes would be stricken on appeal upon the motion of the adverse party. The record reveals that notice was not given until twenty-one (21) days after adjournment of the Circuit Court which is clearly in excess of the statutory period of time allowed. The Mississippi Supreme Court never decided the issue of whether Petitioner was denied effective assistance of counsel by his retained counsel's failure to give timely notice to the court reporter of his intention to appeal. The only question presented was whether or not the notes should be stricken. Petitioner's response to the State's motion to strike presented nothing more than a mere allegation that retained trial counsel was ineffective, because he failed to give timely notice. There was no attempt on Petitioner's part to show ineffectiveness of counsel. No proof was offered to the trial court or the State Supreme Court. The court ordered the notes stricken without written opinion, and Respondent maintains it did so without relying on federal or state Constitutional grounds. Neither Petitioner's reply brief nor brief in support of his petition for rehearing argued the question now presented. The State Supreme Court affirmed the Petitioner's conviction without written opinion and without relying upon federal or state Constitutional grounds.

REASONS FOR DENYING THE WRIT

The Supreme Court of Mississippi in the instant case did not pass upon the issue of whether a person who retains counsel may later raise a claim of ineffective assistance of counsel. The notes of the court reporter were stricken without written opinion, and after briefs and arguments were presented, the court affirmed with no written opinion. Petitioner has not complied with Rule 23(f), Rules of the Supreme Court of the United States, which requires him to specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal question sought to be reviewed was raised and the method by which it was raised and the way in which it was passed upon by the court. Respondent maintains that the issue now presented was not properly raised in the trial court as hereinafter set forth in Respondent's Argument, and the State Supreme Court did not base its decision on federal or state Constitutional grounds.

ARGUMENT

It is well established that this Court will not decide federal Constitutional issues raised here for the first time. *Cardinale* v. *Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

It is also well established that it will be assumed that where the highest State Court has failed to pass upon a federal question, the omission was due to want of proper presentation in the state courts, and the burden of showing otherwise is on the aggrieved party. *Street*

v. *New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).

It is the position of the State of Mississippi that Petitioner's sole federal question presented by his petition has never been passed upon in any of the courts of the State, because it was not properly preserved in the trial court.

In *Fitzgerald* v. *Estelle*, 505 F.2d 1334, 1338 (5th Cir. 1975), the court stated:

> If a retained counsel's actions do not sap the proceedings' fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown.

Petitioner made no effort to show to the trial court or to the State Supreme Court that he was denied reasonably effective assistance of retained counsel other than merely alleging same in response to the State's motion to strike the notes of the court reporter. Petitioner's bare allegation did not properly present the matter to the State Supreme Court. Furthermore, Petitioner has not exhausted his state court remedies in that no petition for a writ of error coram nobis was filed after the conviction was affirmed which would have brought before the state court the Petitioner's allegation of the violation of his Constitutional rights. In the absence of a showing to the contrary, it must be assumed that the court's refusal to pass upon the federal question was due to a lack of proper presentation in the state courts. In addition, the court had adequate state grounds to support its decision

to strike the notes and its affirmation of the conviction. This court has said it will not review a case even though it contains a federal question if there is an adequate state ground that supports the decision of the court. This principle is stated in *Henry* v. *Mississippi*, 379 U.S. 443, 446, 447, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965), in which this Court also stated:

> These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.

At the time of its order to strike the notes, the Mississippi Supreme Court had consistently applied the statutory notice requirement and had consistently held that notice to the court reporter was jurisdictional, and unless the statutory mandate was met, the notes would be stricken on appeal upon the motion of the adverse party. SEE: *Fields* v. *State*, 272 So.2d 650 (Miss. 1973). In the instant case, notice was not timely. It is Respondent's position that Section 9-13-33, Mississippi Code of 1972 serves a legitimate state interest and was the basis for the court's decision to strike the court reporter's notes. The jury instructions argued in Petitioner's brief remained in the record to be argued. Since the court's ruling was grounded on a procedural rule that serves a legitimate state interest, we respectfully submit that this court should not now consider the question before it.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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and

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Of Counsel

CERTIFICATE

I, Catherine Walker, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief for Respondent in Opposition to William Sebastian Moore, 514 Barnett Building, Jackson, Mississippi 39201.

This, the 17th day of September, A. D., 1975.

CATHERINE WALKER
Special Assistant Attorney General